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No. 00-686

IN THE

# Supreme Court of the United States

MARY NEIDIG, Director, Department of Consumer and Business Services of the State of Oregon,

*Petitioner,*

*v.*

NATIONAL WARRANTY INSURANCE COMPANY, RRG, a Risk Retention Group,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Section 6(d) of the Liability Risk Retention Act of 1986 ("LRRA"), which pre-empts state financial responsibility laws that discriminate against risk retention groups, pre-empts the Oregon Service Contract Act, a financial responsibility law that allows service contract obligors to purchase their required contract liability insurance from licensed insurers but not from risk retention groups?

2. Whether an express pre-emption provision in the LRRA should be construed in accordance with statutory construction principles or in accordance with presumptions developed for interpreting statutes that raise the issue of implied pre-emption?

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Respondent National Warranty Insurance Company, RRG ("NWIC"), a risk retention group ("RRG"), respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Petitioner Mary Neidig, Director of the Department of Consumer and Business Services of the State of Oregon ("Director").

## STATUTORY PROVISIONS INVOLVED

The principal federal statutory provisions involved are Sections 3(a)(4) and 6(d) of the Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (1981) ("PLRRA"), *as amended by* the Liability Risk Retention Act of 1986, Pub. L. No. 99-563, 100 Stat. 3170 (1986), *codified as* 15 U.S.C. §§ 3901-3906 ("LRRA") (App. 45-58).[1] The principal state statutory provision involved is Section 646.267(5) of the Oregon Service Contract Act, ORS 646.263 to 646.285 ("OSCA") (App. 61-62).

## COUNTERSTATEMENT OF THE CASE

In her Statement of the Case, the Director makes numerous assertions of fact not of record in this case. She further misstates and misapplies the applicable law. Pursuant to Rule 15 of the Rules of this Court, NWIC's Counterstatement of the Case addresses these misstatements.

### A. Factual Background

The OSCA requires manufacturers, retailers, and others who might sell an extended service contract to be registered by the State of Oregon. To register, these persons must demonstrate that they can be financially responsible for the service contracts they sell. The OSCA permits those individuals or entities to demonstrate financial responsibility

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1. References herein to "App. __" are to the corresponding page numbers of the Appendices to the Director's Petition.

through the purchase of a policy of contract liability insurance from an "authorized" insurer. ORS 646.267(5)(b).

NWIC is an insurance company chartered and licensed in 1984 under the laws of the Cayman Islands, British West Indies. NWIC writes insurance covering only the product liability and completed operations risk of its members who consist of manufacturers, distributors, and dealers of automobiles and automotive products. It has been writing this coverage in the State of Oregon since 1989. NWIC provides its automobile dealer members, *inter alia*, service contract reimbursement insurance on automobile service contracts. The Director conceded below that NWIC was authorized to issue a service contract reimbursement policy,[2] a type of liability insurance for purposes of the LRRA.

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2. The Director correctly observes at page 4 of her Petition that Congress expressly exempted RRGs from any state law that would require or permit an RRG "to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong." 15 U.S.C. § 3902(a)(2). Indeed, Oregon law similarly bars RRGs from joining or contributing financially to any Oregon insurance insolvency guaranty fund. ORS 735.320. The Director omits from her observation, however, the reasons that Congress chose to include this exemption. Indeed, the reason is a reflection of the strength of RRGs, not a weakness:

> There are two reasons for this exclusion. First, risk retention groups are not full-fledged multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages. Second, there will be a strong incentive for risk retention groups to set adequate premiums and establish adequate reserves if each member knows there is no other source of funds (other than its own corporate assets) from which to pay claims.

H.R. Rep. No. 190, 97th Cong., 1st Sess. at 16, 1981 U.S.C.C.A.N. at 1445.

Although NWIC did business in Oregon for many years without incident, in or about September 1997 the Director informed members of NWIC that their service contract reimbursement insurance had to be purchased from an "authorized insurer" — *i.e.*, Oregon licensed insurer, if the member wanted to maintain the registration required under the OSCA. With respect to this policy of enforcement, the Director made a number of admissions that are of record in this proceeding:

> 1. The Director considers only RRGs that are domiciled in the State of Oregon and established as an insurer under the laws of Oregon to be "authorized insurers" because these RRGs hold certificates of authority to do business in the State of Oregon.
>
> 2. The Director will not accept an insurance policy issued by a foreign RRG[3] as meeting the financial responsibility requirement established for an obligor under a service contract.
>
> 3. A foreign RRG does not need a certificate of authority to operate in the State of Oregon, but even if a foreign RRG requested a certificate of authority, the Director will not issue one.
>
> 4. The Director will not accept insurance policies issued by foreign RRGs as satisfying the financial responsibility requirements of the OSCA even if the foreign RRG has an excellent rating from

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3. The phrase "foreign risk retention group" or "foreign RRG" is used generally herein to refer to those RRGs that are not domiciled in the State of Oregon and to which the Director has not issued a certificate of authority to conduct the business of insurance in the State of Oregon, but, nonetheless, meet all of the requirements of the PLRRA and LRRA.

> A.M. Best or Standard and Poors and/or a rating that exceeds the financial strength of the so-called "authorized insurers" issuing service contract reimbursement policies to automobile dealers in the State of Oregon.

The position taken by the Director stands in stark contrast to the enforcement policies of at least two other states with laws similar to the OSCA — Wyoming and Oklahoma.[4] Wyoming and Oklahoma have laws that permit a service contract obligor to prove financial responsibility by the purchase of a service contract reimbursement insurance policy from an "authorized" insurer or a "licensed company." Wyo. Stat. § 26-37-108(c), Okla. Stat. tit. 36, § 6602(14)(b). Wyoming and Oklahoma, however, have concluded that coverage from NWIC is acceptable, reasoning, in the case

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4. At page 5 and later in footnote 20 of her Petition, the Director refers to statutes from various states that are similar to the OSCA. The statutes use different terminology, *i.e.* "contract liability insurance" instead of "service contract reimbursement insurance," but they are similar in scope and purpose. In fact, in her "Question Presented," the Director states that like Oregon, "more than half the States . . . exclude[s] insurance obtained from risk retention groups as acceptable proof of financial responsibility." This assertion of fact, however, is not of record. There is nothing in the record to suggest that each and every state cited by the Director, let alone "more than half the States," has adopted the same policy of enforcement for their respective service contract laws that the Director has taken with respect to the OSCA — specifically, a policy that categorically bars RRGs from insuring their members. Indeed, as noted above, the only record in this case reveals that at least two states, one of which is cited by the Director in footnote 20 of her Petition, have not enforced their service contract laws in a way that bars RRGs as Oregon has done. The Director's list is incomplete, omitting Oklahoma. Some states, such as West Virginia, have chosen not to regulate service contracts and, instead, expressly exempt them from regulation. W. Va. Code § 33-4-2(a)(5).

of Wyoming,[5] that NWIC is "authorized" by virtue of federal law, *i.e.*, the LRRA.[6]

At issue in this case, then, is whether under the Director's policy of enforcement, the OSCA, specifically ORS 646.267(5)(b), is a state law that discriminates against RRGs and their members in violation of the express prohibition against discrimination found in Section 6(d) of the LRRA, 15 U.S.C. § 3905(d) (App. 57).

## B. Proceedings Below

NWIC initiated this case in the United States District Court for the District of Oregon pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, seeking declaratory and injunctive relief because the Director interpreted and applied ORS 646.267(5)(b) in a manner that thwarted the nationwide operation of NWIC and prohibited NWIC from serving its

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5. Oklahoma did not explain the basis for its conclusion. It informed NWIC that the service contract program of its members under review was "exempt" from the Oklahoma law, perhaps because it concluded that the Oklahoma law, as written, discriminated against RRGs.

6. In her Petition, the Director in many instances seeks to change the record facts of this case or, alternatively, to augment the factual record. At pages 4 and 5 of her Petition, the Director writes of "[m]any retailers" who allegedly have found it profitable to sell "service contracts." On page 5, the Director also references the bankruptcy of a "large home appliance retailer that left hundreds of service contracts worthless." In footnote 6 of her Petition, the Director states that "very few insurers are actually chartered in Oregon and the vast majority of authorized insurers doing business in Oregon are domiciled in other states." These allegations of fact are not of record below and, thus, would not properly be before this Court if it decides to review the Ninth Circuit's decision. Accordingly, they do not and should not bear on this Court's evaluation of the Director's Petition.

members in Oregon. Because there were no genuine issues as to any material fact and judgment as a matter of law was appropriate, NWIC and the Director each filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

The parties asked the District Court to decide whether the LRRA pre-empted a provision of the OSCA — *i.e.*, ORS 646.267(5)(b). This provision requires manufacturers, retailers, and others who might sell an extended service contract on a manufactured good to purchase contract liability insurance only from a licensed, or "authorized," insurer, and not from a RRG. The parties agreed that the OSCA was a financial responsibility law within the meaning of the LRRA, 15 U.S.C. § 3905(d) (App. 57). They also agreed that the LRRA saves state financial responsibility laws from pre-emption so long as those laws do not "otherwise discriminate against a risk retention group or any of its members." 15 U.S.C. § 3902(a)(4) (App. 50). They did not agree, however, on whether the OSCA was a financial responsibility law that discriminated against NWIC or its members.

Following briefing and oral argument, the District Court, by Magistrate Judge Janice M. Stewart, held that the OSCA discriminates against RRGs and their members and, thus, was not saved from pre-emption by Section 6(d) of the LRRA, 15 U.S.C. § 3905(d). *National Warranty Ins. Co., RRG v. Greenfield*, 24 F. Supp. 2d 1096 (1998), *aff'd*, 214 F.3d 1073 (2000).[7] The District Court entered a Judgment

7. In her "Statement of the Case," at pages 7 and 8 of her Petition, the Director offers summaries of the District Court's Opinion and the Ninth Circuit's Opinion below. NWIC disagrees with the Director's characterization of those Opinions. The District Court and the Ninth Circuit acknowledged the challenge presented by the language of the LRRA, but they followed time-honored principles of statutory construction in reaching their conclusion that the OSCA was pre-empted by the LRRA.

consistent with its Opinion on September 18, 1998, which included declaratory and injunctive relief and an award of reasonable attorneys' fees and expert fees pursuant to 42 U.S.C. § 1988.

The Director filed a Notice of Appeal from the District Court's Judgment on October 16, 1998. Following briefing and oral argument, a unanimous panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000). The Director filed a Petition for Rehearing En Banc, which the Ninth Circuit denied on July 20, 2000.

## REASONS FOR DENYING THE WRIT

This case involves a narrow question of statutory construction — specifically, the interpretation of a provision in the LRRA that saves non-discriminatory financial responsibility laws from the LRRA's broad and express pre-emptive effect. Because the OSCA discriminates against RRGs, the District Court and Ninth Circuit held that it was not saved, but, rather, pre-empted by the LRRA.

Rather than argue why this Court should review the decisions of the Ninth Circuit and District Court, the Director focuses her arguments on the merits of the case, which are addressed in this Brief. The Petition should be denied, however, because: (1) the Ninth Circuit's decision is directly contradicted only by the Eleventh Circuit and, between the two decisions, is the one that gives effect to the entire LRRA; (2) the Ninth Circuit's decision is consistent with the pre-emption principles established by the rulings of this Court; and (3) there is no evidence on the record that the majority of states that have enacted a statute similar to the OSCA enforce their laws in the way that the Director did prior to the issuance of the District Court's injunction.

## I. The Courts of Appeals Are Divided on the Proper Interpretation of Section 6(d) of the LRRA, but the "Split" is Not Sufficient to Grant Certiorari.

This case turns on the meaning of 15 U.S.C. § 3905(d) (App. 57), and its impact on the OSCA. Congress expressly pre-empted a state financial responsibility law that discriminates against insurers organized as RRGs in favor of insurers licensed by the state. The Ninth Circuit concluded that the OSCA was such a law. This result is contrary to the result reached by the United States Courts of Appeal for the Seventh and Eleventh Circuits. Upon closer examination, however, it is apparent that a true split lies only between the Ninth and Eleventh Circuits.

From the beginning of this case, the Director has advocated slavish adherence to decisions from the United States Courts of Appeals for the Eleventh (*Mears Transp. Group v. Florida*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995)) and Seventh (*Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998) ("*OMIC*")) Circuits. Both the Ninth Circuit and the District Court below reviewed and analyzed these decisions thoroughly but appropriately rejected them in favor a more logical and complete reading of the LRRA that gives effect to all its provisions, not just the selected words in Section 6(d) on which the Director relies. *See Mountain States Telephone and Telegraph Co. v. Santa Ana*, 472 U.S. 237 (1985) (holding that a statute should be construed, if possible, to give meaning to all of its component parts).

Put simply, the Eleventh Circuit's analysis in *Mears* was erroneous.[8] The Eleventh Circuit held that Section 6(d)

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8. Senior Judge Roney observed in his strong dissent, which appears at pages 1019 through 1020 of that opinion, that the Florida statute was "precisely the type of state law that Congress" intended to pre-empt. *Mears*, 34 F.3d at 1016.

allowed states to exclude all RRGs from having their insurance policies accepted as a means of demonstrating motor vehicle financial responsibility, ignoring, as noted in the *Mears* dissent, the first sentence of Section 6(d), which prohibits discrimination against RRGs. The Eleventh Circuit based its ruling on select words from the second sentence of Section 6(d), *i.e.*, "means may . . . exclude insurance coverage . . . from . . . a risk retention group," and concluded that the Florida statute disallowing insurance from a RRG was saved from the pre-emptive effect of the LRRA. *Mears*, 34 F.3d at 1019. As noted by the District Court below, the reading given to Section 6(d) by the Eleventh Circuit in *Mears* is flawed because it simply ignores the prohibition against discrimination. It also ignores the fundamental purpose of the LRRA.[9] A state may entirely exclude insurance as a "means" of demonstrating financial responsibility. But if it chooses insurance as such a "means," it may not choose only insurance policies issued by licensed insurers to the exclusion of those issued by RRGs.

In *OMIC*, the second case cited by the Director to show a split, the Seventh Circuit relied on *Mears* to find a state law saved from pre-emption. The Seventh Circuit, however, did not address the issue of whether the state law at issue

9. At page 11 of her Petition and later at page 21, the Director directs the Court to the reasoning of the *Mears* court. It claimed that a neutral standard that would qualify insurers on economic grounds, such as minimum net worth, would be redundant of other provisions in the LRRA. No such redundancy exists. A state insurance department may seek an injunction against a financially hazardous RRG already doing business in the state (15 U.S.C. §§ 3902(e), 3906) (App. 52, 57), but this is not the same as disqualifying an insurer from a market in the first place. The act of qualifying a particular insurer under Section 6(d) for participation in a financial responsibility program and the act of enjoining a financially troubled insurer that is already doing business within the state are separate and distinct, not redundant, acts. This distinction is reflected in virtually every state's insurance regulatory scheme.

improperly discriminated against RRGs because the plaintiff did not make that argument on appeal. *OMIC*, 143 F.3d at 1065. The Seventh Circuit expressly noted that the issue of discrimination was not before it. *Id.* Instead, the plaintiff based its claim on the argument that the state law in question was not a financial responsibility law within the meaning of Section 6(d). The Ninth Circuit's decision below is not in direct conflict with the Seventh Circuit's decision in *OMIC* because the Seventh Circuit did not address the issue of discrimination.

The construction adopted by the Ninth Circuit gives meaning to all provisions of Section 6(d), not just selected words from its second sentence, as was done in *Mears*. States may enact *nondiscriminatory* financial responsibility laws. The Director's construction, by contrast, would defeat this Congressional intent. As the District Court aptly concluded:

> Pursuant to [the Director's] interpretation, a state could provide discriminatory advantages to domestic insurers without any possibility of meaningful federal pre-emption. The proper construction of the LRRA's "financial responsibility" provision is that a state may specify an acceptable means of demonstrating financial responsibility for licensees, but only when those means are the same for domestic insurers and RRGs and do not discriminate against all RRGs as a class.

*National Warranty*, 24 F. Supp. 2d at 1107 (App. 42). The Ninth Circuit and the District Court appropriately rejected the Director's construction.

Whether a United States court of appeals has entered a decision in conflict with the decision of another United States

court of appeals is a factor in determining whether to grant a petition for writ of certiorari. However, the Ninth Circuit's analysis is so compelling that other courts facing this issue would likely follow the reasoning of the unanimous Ninth Circuit decision and not that of the divided panel in *Mears*. Accordingly, this factor does not support granting the petition for a writ of certiorari in this case.

## II. States May Qualify Insurers That Will Participate in a Financial Responsibility System, but the Qualification Must be Neutral as to the Organization of the Insurer.

States license a number of activities, such as the operation of a motor vehicle to cite a common example, and condition the grant of a license upon an applicant's demonstration of financial responsibility.[10] The purchase of liability insurance is a common "means" for demonstrating financial responsibility, but there are others. A state may require participation in a state fund as the appropriate "means" or authorize the establishment of a self-insured trust.[11] The LRRA does not impede the ability of a state to devise financial responsibility programs appropriate for its state and for a licensed activity. Where a state chooses insurance as the "means," however, its qualification of an insurer must not discriminate against RRGs or their members. In other words, the qualification must be neutral as to the way the insurer is organized. This is the meaning given to Section 6(d) by the Ninth Circuit.

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10. The District Court identified different types of financial responsibility laws enacted by the State of Oregon relating to licensing of weather modification programs, liquor service and outdoor guides and outfitters. (App. 33).

11. *See, e.g.*, Ohio Rev. Code Ann. § 4125.38 (requiring employers to demonstrate financial responsibility for their workers compensation obligations either by participating in a state fund or by establishing a self-insured program that is acceptable to the State of Ohio).

In reaching this conclusion, the Ninth Circuit parsed the language in Section 6(d) and the cross reference to Section 3(a)(4). It did so in a way that was consistent with the overall purpose of the LRRA, *i.e.*, to enable common businesses to establish their own insurance company to provide for their liability insurance needs free from state-by-state regulation. Congress balanced the need of RRGs to operate on a multi-state basis in order to succeed with the need of states to adopt financial responsibility programs for the protection of its consumers. The Ninth Circuit decision, unlike those of the Seventh and Eleventh Circuits, keeps these interests in balance.

### A. The LRRA's Prohibition Against Discrimination Means that States Cannot Treat RRGs Differently From Licensed Insurers Without an Acceptable Justification.

The LRRA pre-empts laws "that otherwise discriminate." 15 U.S.C. § 3902(a)(4). The *Mears* court held that it was necessary to show an intent to discriminate by the state legislature in order to violate this provision. The word "intent" does not appear anywhere in this provision. The language bars discrimination entirely as the District Court concluded below:

> The wording of the LRRA certainly does not require or even imply that an RRG must prove discriminatory intent by a state legislature. The LRRA exempts RRGs from any state law or order that "regulate[s], directly or indirectly, the operation" or "otherwise discriminate[s] against" an RRG. It bans any discrimination, not just intentional discrimination.

*National Warranty*, 24 F. Supp. 2d at 1107 (alterations in original) (citation omitted) (App. 37). Thus, state laws that have the purpose *or* effect of discriminating against RRGs are pre-empted. *See* 15 U.S.C. § 3902(a)(4) (App. 50);

132 Cong. Rec. S15446-01 (1986); *Charter Risk*, 796 F. Supp. at 159 & n.8.[12]

The discrimination in this case is irrefutable. NWIC's members cannot use the service contract reimbursement insurance they purchase from NWIC to satisfy the financial responsibility requirements of the OSCA. It is not just coverage from NWIC that is unacceptable, but coverage from *any* RRG, and this is true even if the proposed RRG has a "A" rating from A.M. Best. By contrast, coverage from a licensed, or "authorized," insurer with "C-" rating from A.M. Best would be acceptable. The OSCA provides that no RRG, regardless of its financial strength, can offer insurance to its members that will qualify as demonstrating financial responsibility. It discriminates.

The first federal court to examine the meaning of Section 6(d) of the LRRA considered a Pennsylvania statute that required certain common carriers — *i.e.*, limousine drivers,

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12. In her Petition the Director quotes from the debate in Congress that she believes support her view of the LRRA. However, these comments can also be construed to refute her view. Perhaps this is one reason why this Court has held that "the remarks of a single legislator, even a sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). To the extent statements from individual legislators, however, are relevant, there are statements omitted by the Director that refute her contentions. *See* 132 Cong. Rec. S15446-01 (remarks of Senator Kasten that discrimination pre-emption applies to laws that are both intended to prohibit "or which unjustifiably prohibit" the operation of RRGs); *id.* (remarks of Senator, now Vice President Gore that power to enact financial responsibility laws may not be exercised in a "manner" that unfairly and unreasonably discriminates against RRGs); *id.* (remarks of Senator Gorton that financial responsibility laws must not make unfair distinctions between RRGs and conventional insurers). These particular legislators were not passing on the purpose or subjective intent of the States; rather, they would judge the effect of the state law in question.

taxi cabs, etc. — to obtain insurance from an insurer "authorized to do business within the Commonwealth" as a prerequisite to obtaining a license from the Public Utility Commission ("PUC"). *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992). The PUC held that "authorized" meant "licensed" and refused to accept the coverage from a RRG. The district court analyzed this state law in light of Section 6(d) of the LRRA and concluded that it was pre-empted. In doing so, the district court reviewed all of the language of Section 6(d) and opined:

> . . . [T]his provision means that should a *particular* risk retention group fail to meet conditions of financial responsibility, they may properly be excluded. Any other reading of this provision (such as that states may exclude risk retention groups *in general* as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provision of the Act.

*Id.* at 159 n.6 (emphasis added). The district court held that the qualification of an insurer must be neutral as to how the insurer is organized; it might, for example, qualify the insurer, whether a licensed insurer or an RRG, on the basis of the insurer's financial claims-paying rating. The Ninth Circuit agreed with this approach. (App. 8-9).

NWIC is barred by the OSCA from insuring its members in Oregon solely because it is an RRG and not on the basis of any neutral standard that is also applied to licensed insurers. If such a law does not discriminate against RRGs in violation of 15 U.S.C. §§ 3905(d), 3902(a)(4), then, like the District Court below, NWIC "is at a loss to know what would constitute a discriminatory financial responsibility law." *National Warranty*, 24 F. Supp. 2d at 1105 (App. 33).

The Ninth Circuit squarely addressed the question of how to construe "otherwise discriminate" as used in Section 6(d). Lacking an express definition of "discriminate" in the LRRA, the Court properly afforded a definition consistent with the "normal usage" of the word — that being "differentiation without an acceptable justification." *National Warranty*, 214 F.3d at 1081 (App. 14). Recognizing that the LRRA is in essence a law regulating commerce throughout the several states,[13] the Ninth Circuit appropriately concluded:

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13. This Court's recitation of the events that led to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, supports the Ninth Circuit's decision to invoke commerce clause principles in interpreting the LRRA:

> Prior to our decision in *United States v. South-Eastern Underwriters Assn.* . . . we had consistently held that the business of insurance was not commerce. The business of insurance, in consequence, was largely immune from federal regulation. In *South-Eastern, we held for the first time that an insurance company doing business across state lines engages in interstate commerce*. In accord with that holding, we further decided that the Sherman Act applied to the business of insurance. Concerned that our decision might undermine state efforts to regulate insurance, Congress in 1945 enacted the McCarran-Ferguson Act.

*Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999) (emphasis added) (citations omitted). Although the McCarran-Ferguson Act had the effect of allowing the several States to regulate the business of insurance within their respective borders and precluding application of federal laws general in character that would frustrate or interfere with those efforts, under *Humana*, the business of insurance across state lines in interstate commerce remains subject to federal oversight. The LRRA, which provides for the interstate operation of insurance companies as RRGs, then, is an example of Congress' exercise of its authority to regulate interstate commerce.

> We are given little guidance on how to construe § 3902(a)(4), but it seem to us most likely that Congress did not intent to forbid only facial or intentional discrimination by state laws. The LRRA is a statute with a purely economic purpose, and we believe it most likely that Congress had in mind the economic effect of state laws rather than any specific intent that might lie behind them. *See generally* U.S. Const. Art. I, § 8, cl. 3 (Commerce Clause); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (" 'discrimination' simply means differential treatment").
>
> Based on the foregoing, we conclude that the most reasonable reading of §§ 3905(d) and 3902(a)(4) is that the State of Oregon may not exclude insurance coverage from all RRGs under § 3905(d). *It may exclude coverage from a particular RRG if it can show that the particular RRG is financially unsound or is otherwise dangerous to those who rely on insurance* purchased pursuant to the Oregon Service Contract Act, but it may not categorically exclude coverage from all RRGs.
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> . . .
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> . . . . We believe that in passing the LRRA, Congress decided that RRGs, as a group, were sufficiently trustworthy providers of insurance that they should be allowed to provide insurance free of state regulation, subject only to specifically granted and fairly narrowed exceptions.

*Id.* at 1081-82 (emphasis added) (App. 15).

The Director believes that the key to the meaning of "otherwise discriminate" lies in Section 3, which allows nonchartering states to require RRGs to comply with trade practice laws, to pay premium taxes, to participate in statutory facilities that provide insurance where it is unavailable in the voluntary market, and to require RRGs to license their agents. 15 U.S.C. § 3902(a)(1). By way of example, the Director notes that states may choose to tax RRGs, but if they do so it must be nondiscriminatory. This observation is sound, but then the Director falls off the rails. She asserts that Section 3 establishes a "choice" threshold to the proscription against discrimination, *i.e.* states may choose to exclude all RRGs from a financial responsibility program while including all licensed insurers.[14] This is not, in the Director's view, discrimination. This view does not comport with common sense, never mind the language and purpose of the LRRA.

The better reading of Section 3 suggests that Congress was concerned about excluding RRGs from operating in a state for any reason relating to its status as a RRG, as opposed to how it conducted its business. But for the Section 3 prohibition against discrimination, a state could effectively exclude all RRGs from its borders by imposing a premium tax that was twice that of the tax paid by a licensed insurer. It could achieve the same by subjecting RRG agents to a qualifying examination beyond the reach of a Ph.D. "Otherwise discriminate"[15] means imposing burdens upon RRGs that are not imposed upon licensed insurers.

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14. If Congress meant to give states this "choice," it would have been expressed in a simple, short sentence: States may choose to exclude coverage from a risk retention group in a state financial responsibility program.

15. "Otherwise" means "[i]n another way; differently," "[u]nder other circumstances," or "[i]n other respects." AMERICAN HERITAGE DICTIONARY 880 (2d ed. 1985).

The Ninth Circuit found "otherwise discriminate" to mean "differentiation without an acceptable justification." The Ninth Circuit concluded that the OSCA, which prohibits insurance from NWIC *only* because NWIC is not a "licensed insurer," differentiates without an acceptable justification and, thus, discriminates against NWIC as an RRG and against all RRGs. It is, therefore, not saved from pre-emption by Section 6(d). No other conclusion gives meaning to Congress' express intent.

### B. The Director's Claim that the OSCA Is a "Consumer Protection" Law Has No Bearing on Whether It Is Pre-empted by the LRRA.

The Director claims that the OSCA is a consumer protection law suggesting, perhaps, that because the discrimination in this case is in the name of protecting consumers, it should be permitted. All financial responsibility laws, however, can be described as consumer protection laws. States impose financial responsibility requirements on certain licensed activities in order to protect those who purchase goods and services from the state-licensed persons or enterprises. Congress recognized the value of such laws in the LRRA. It did not, however, give states *carte blanche* to interfere with the proper operations of a lawful RRG using the shield of a "saved" financial responsibility law.

When Congress expanded the scope of the PLRRA into other lines of liability insurance coverage,[16] it had to come to

16. The LRRA does not differentiate between types of commercial liability insurance. Under either the PLRRA or the LRRA definitions, NWIC is authorized to write what Oregon law refers to as "service contract reimbursement insurance." In this regard, the insurance issued by NWIC to its Oregon dealer members is identical to the insurance offered by the Home Owners Warranty Insurance Company ("HOW"), a RRG, to its members. *See Home Warranty Corp. v. Elliott*, 572 (Cont'd)

terms for the first time with state financial responsibility laws. Section 6 clarifies the pre-emptive effect of the LRRA with respect to such state laws. It provides, for example, that RRGs offering mandatory commercial motor vehicle insurance to members would have to do so in accordance with the state law's mandate with respect to the types and limits of coverage. 15 U.S.C. § 3905(a). Congress could have simply said that states may exclude RRGs from participation in such programs, but it did not. It allowed the establishment of standards for the "means" of demonstrating financial responsibility so long as they were neutral as to the organization of the insurer whether it be an RRG, a licensed insurer, or an excess lines insurer.

The Director argues that only licensed insurers should write service contract reimbursement insurance because only licensed insurers participate in state guaranty fund. There are flaws with this argument. First, Congress found, with good reason, that RRGs should not be required to participate in guaranty funds.[17] Second, the Director would accept coverage from an Oregon domiciled and licensed RRG, even though it does not participate in the Oregon guaranty fund. Third, regardless of whether the RRG remains solvent, the automobile dealer remains obligated to the

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F. Supp. 1059 (D. Del. 1983). The court in *Home Warranty Corp.* concluded that, based on the broad definition of "product liability" in the PLRRA, liabilities arising from the manufacture, design, lease, or sale of a new home were product liabilities and, therefore, the insurance issued by HOW fell within the protections of the PLRRA. *Id.* at 1065-66. The insurance at issue in this case is no different and, thus, falls within the scope of the PLRRA and the LRRA. To the extent the Director seeks to challenge whether service contract reimbursement insurance is liability insurance within the meaning of the LRRA, she may not do so in this appeal. She has failed to preserve the issue for appeal. Indeed, the Director conceded the issue before the District Court.

17. *See supra* note 2 and *infra* note 22.

consumer who purchases a service contract. Thus, it is the member of the RRG, not the automobile "consumer," who bears the risk of the RRG's insolvency.

If the OSCA is a consumer protection law, it is hardly an effective one. Consumers would be better protected by a financial responsibility law that measures the financial strength of the insurer rather than one that simply requires that the insurer be licensed. Such a financial responsibility law would be saved from pre-emption by Section 6(d). The OSCA, however, is not such a law and, therefore, the Ninth Circuit's holding that it was pre-empted is appropriate.

The fact that the OSCA may be characterized as a "consumer protection" law is of no moment. It does not bear upon the statutory construction issues in this case. In any event, the LRRA is also a "consumer protection" law. It protects business consumers who may find themselves suddenly unable to purchase commercial liability insurance at any price by allowing them to form RRGs. The Director's characterization of the OSCA as a consumer protection law leads only to circular reasoning.

### C. The Ninth Circuit's Holding Is Consistent with Pre-emption Principles Established By This Court.

The Director offers a pre-emption analysis that goes far beyond existing principles and would, if adopted, frustrate the ability of Congress to legislate. There can be no doubt that the subject matter of the LRRA, *i.e.* the ability of businesses to establish a RRG that can offer coverage to members nationwide, falls within the powers given to Congress to regulate interstate commerce.[18] In the LRRA,

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18. *See National Warranty*, 214 F.3d at 1076, 1081 (App. 5, 15).

Congress pre-empted state insurance laws that would impede the ability of RRGs to so operate. It saved, however, nondiscriminatory financial responsibility laws from this pre-emption. The Director asserts that because the exemption of *discriminatory* financial responsibility laws from the saving provision is not clear, it should be disregarded. The presumption in favor of state laws does not go this far.

The Director accuses the Ninth Circuit of giving only "lip service" to well established pre-emption principles and attacks the court's analysis as "tissue thin." These insults miss the mark because the principles offered by the Director in her Petition are the very ones considered by the Ninth Circuit throughout its analysis. *See National Warranty*, 214 F.3d at 1076-77 (App. 5-6). As the Ninth Circuit appropriately observed: "Even with a general presumption that insurance law should ordinarily be regulated under state law, as reinforced by the McCarran-Ferguson Act, the language and purpose of the LRRA clearly indicate an intent to pre-empt state laws regulating RRGs." *Id.* at 1077 (footnote omitted) (citing 15 U.S.C. §§ 3902(a), 3905(d)) (App. 6-7).

The Director's new, and extreme, approach to pre-emption analysis would hold that if the exemption from a savings clause is "ambiguous," then the presumption in favor of state laws should be employed to find in favor of saving, not pre-empting, the state law. In other words, courts need not interpret federal statutes where the task may be daunting. The Director argues from two false premises: first, that the Ninth Circuit found Section 6(d) "ambiguous," and, second, that the presumption in favor of state laws should be employed where the pre-emption question is not an implied one but rather an express one.

First, the Ninth Circuit did not state that Section 6(d) of the LRRA was "ambiguous." It acknowledged, as did the

District Court,[19] that the language was not clear. Nevertheless, the Ninth Circuit exercised its constitutional duty to construe the meaning of Section 6(d), even though it may have been a challenge. It did so using time-honored principles of statutory construction whereby it examined the use of the word "discrimination" throughout the LRRA, the purpose of the LRRA as a whole, and the ordinary meaning of the term. Its analysis was sound.

Second, it is questionable that presumptions should apply in a case, such as this one, where the pre-emption issue is one of express pre-emption, as opposed to implied pre-emption. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that "Congress' intent [to pre-empt a state law] may be stated in the statute's language or implicitly stated in its structure and purpose." *Id.* at 516. In *dicta*, the Court also stated that

> [a]lthough the presumption against pre-emption might give good reason to construe the phrase "state law" in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate.

*Id.* at 521. It is the language of the federal statute, not the presumption, that determines the meaning of an express pre-emption provision.[20]

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19. The District Court addressed the "linguistic ambiguity" in Section 6(d) by combing the legislative history, examining the words to find a "rational purpose" by Congress, and analyzing the contrary decisions. (App. 29-40).

20. In his Opinion, concurring in part and dissenting in part, Justice Scalia noted that the presumptions used in implied pre-emption cases should not hold sway in an express pre-emption case; instead, ordinary principles of statutory construction should be followed. He opined:

> Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are

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In *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (2000), this Court warned against placing more weight on a savings clause than it can bear. It upheld limits on a savings clause even though the state argued that its police powers were at stake. The Court held that

> [l]imiting the saving clauses as we have determined respects the established federal-state balance in matters of maritime commerce between the subjects as to which the states retain concurrent powers and those over which the federal authority displaces state control. . . . We decline to give *broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.*

*Id.* at __, 120 S. Ct. at 1147 (emphasis added). The Ninth Circuit's analysis is consistent with this directive. Congress' intent to pre-empt state laws that discriminate against RRGs was express, as set forth in Section 3902(a)(4). The Ninth Circuit avoided an overly broad interpretation of the saving provision of Section 6(d) with respect to state financial responsibility laws, which would have thwarted Congress' overall goal of facilitating the nationwide operation of RRGs.[21] In lieu of the interpretation

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> eliminated. . . . The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: their language should be given its ordinary meaning.

*Id.* at 547 (Scalia, J. concurring in part and dissenting in part). Justice Scalia was critical of the notion that a pre-emption provision should be either narrowly or broadly construed; rather, the words used by Congress should determine the outcome of a statutory construction case.

21. Congress recognized that a RRG needed to operate on a multi-state basis in order to succeed:

> Some states have created capital and other requirements that make it difficult for risk retention groups to form or to

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advocated by the Director, the Ninth Circuit chose to give the undefined term "discrimination" its ordinary meaning in the context of Congress' regulation of interstate commerce.

The OSCA discriminates against NWIC as a RRG and against all RRGs. It is, therefore, not saved from pre-emption by Section 6(d). Although the Director disagrees with this result, no other gives meaning to Congress' express intent.

## III. The Impact of This Case Is Not As Broad As Claimed by The Director.

The Director argues that this case has widespread significance because over half the states have enacted a service contract regulatory scheme similar to that embodied in the OSCA. She assumes, without any support in the record, that these other states interpret and enforce their laws in the way that has been attempted by the Director. However, as noted above, the Director's position[22] is contradicted by the

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> operate on a multi-state basis. . . . It is necessary to exempt risk retention . . . groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.

H.R. Rep. No. 865, 99th Cong., 2d Sess. 8-9, 1986 U.S.C.C.A.N. at 5303, 5304.

22. The Director contends that RRGs are somehow less worthy insurers because they do not participate in guaranty funds. The record demonstrates the error of this contention because the Director would accept insurance from a member of an Oregon licensed RRG seeking a certification. However, that licensed RRG, like NWIC, does not and cannot participate in Oregon's guaranty fund. With this record, the Director's "safety net" argument unravels. Indeed, for reasons stated previously, Congress has already determined as a matter of

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enforcement policies of at least two other states with laws similar to the OSCA — Wyoming and Oklahoma.

But that does not mean that had the Director succeeded below, other states might not attempt what the Director has attempted in Oregon. That is why the Ninth Circuit's decision was so important to the RRG industry and RRG members, as the District Court explained:

> Since a state in one way or another issue[s] licenses or permits for most commercial and professional activities, the Director's interpretation carried to the logical extreme would allow a state to virtually prohibit RRGs from writing all types of liability insurance. A state would need only require that all licensees or permit holders obtain insurance from a domestic insurer as proof of financial responsibility. . . .
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policy that RRGs carry a level of financial security by the nature of their limited operations and coverage that is not present with traditional multi-line insurance companies. H.R. Rep. No. 190, 97th Cong., 1st Sess. at 16, 1981 U.S.C.C.A.N. at 1445. As the District Court held:

> When Congress exempted RRGs from participating in insurance insolvency guaranty funds, it certainly could not have intended for a state to use that exemption as a reason to exclude RRGs from providing coverage to its members in that state. Otherwise, a state could easily defeat the very purpose of the LRRA pre-emption and "render meaningless the anti-discrimination provisions of the [LRRA]." *Charter Risk*, 796 F. Supp. at 156.

*National Warranty*, 24 F. Supp. 2d at 1105-06 (alteration in original) (App. 35).

> . . . Pursuant to this interpretation, a state could provide discriminatory advantages to domestic insurers without any possibility of meaningful federal pre-emption.

*National Warranty*, 24 F. Supp. at 1105, 1109 (App. 33, 42).

The Ninth Circuit and the District Court employed sound analyses of the LRRA and correctly applied well-settled principles of pre-emption. Their decisions serve as notice to other states not to adopt a discriminatory enforcement policy similar to the Director's.

## CONCLUSION

For the reasons stated in the foregoing paragraphs, NWIC respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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